UNITED S

I. BACKGROUND

Over a nine-month period beginning in November 2011, a group of telemarketers obtained more than $2,500,000 from consumers through a fraudulent credit card interest rate reduction scheme called "Treasure Your Success" ("TYS"). This action began with a complaint and temporary restraining order against five original defendants: Willy Plancher, Valbona Toska, and three companies they controlled, including a company doing business as TYS. (Doc. No. 1.) After commencing discovery, the FTC filed an Amended Complaint naming eight additional Defendants: Smith and his company, HES; Jonathon E. Warren and his two companies, Business First Solutions, Inc. and VoiceOnyx Corp.; Ramon Sanchez-Ortega; and UPS and its president, Derek DePuydt ("DePuydt"). For ease of reference, the Court will refer to Plancher, Toska, Smith, Warren, and their companies collectively as the "TYS Defendants." The other Defendants—Sanchez-Ortega, UPS, and DePuydt—). Fg c1rtbd its DePuferen02 Tc-anchez

their numbers on the National Do Not Call Registry; these consumers testified that they had never had any previous dealings with the TYS Defendants. (*See, e.g.*, Pl.'s Exs. 4, 7, 8, 9 (Doc. Nos. 6-3, 6-4).) It is unsurprising that the TYS Defendants failed to remove the phone numbers of consumers who were on the Do Not Call Registry, as the TYS Defendants never paid the requisite fees to access it. (Pl.'s Ex. 1, (Doc. No. 6-1) ¶¶ 12-15.) The TYS Defendants also lacked an effective procedure for removing consumers' phone numbers from their call lists, (Pl.'s Ex. 18 (Doc. No. 6-7) ¶ 15), and called some consumers multiple times, even though the consumers had previously instructed the TYS Defendants not to call again. (Pl.'s Exs. 6, 9).

If a consumer responded favorably to the robocall, he or she would be transferred to a live person. (Pl.'s Ex. 31 (Plancher Dep.) (Doc. No. 174-1) 43:3-43:9.) A telemarketing training manual (a copy of which the FTC obtained after searching the telemarketing boiler room) explained how a successful call should proceed from the telemarketer's perspective:

> After speaking with a fronter [sic] who pushes the client into giving their credit card number, a closer who convinces them it's in their best interest to spend between $600-$1,000 in order to get out of debt, and a verifier who confirms they understand a charge will be placed on their account . . . the financial advisor [will] get on the phone with their lenders and get their rates lowered. If you had a hard time following that imagine how the client feels. p

purported credit card interest rate reduction service. (Pl's. Ex. 27 (Toska Dep.) 60:17-76:18; Plancher Dep. 70:7-72:10.)

The TYS Defendants told some consumers that they could reduce the consumers' credit card interest rates dramatically—sometimes, to a specific rate, and other times, by "over" or "at least" half—while other consumers were told that the TYS Defendants' debt relief program would achieve thousands of dollars in guaranteed savings. (*See, e.g.*, Pl.'s Exs. 4, 6, 8, 10, 12, 13 (Doc. Nos. 6-3, 6-4, 6-5).) The TYS Defendants also promised some consumers that they would be able to repay their credit card debt significantly faster by enrolling with TYS. (Pl.'s Exs. 4, 24, 26 (Doc. Nos. 6-3, 6-9).) These representations did not materialize out of thin air—training manuals and telemarketing scripts used by the TYS Defendants recommended making these and similar offers. (Pl.'s Exs. 53, 56 (Doc. No. 174-2); Pl.'s Ex. 35 (Smith Admis.) ¶¶ 57, 58 (admitting that he (Smith) was "aware that the telemarketing sales scripts of TYS involved representing to consumers that the comw(Planchesngcings. ig1e com.14.2conschesngcers(a)-l47 -2.3 TD TD.01ronsum)8.34ers' credit

3interest rate

3Usumrpris4.9(l)-1.85(n5.7(lg)7(ldy,ohei4.95(r-1.8(er isnot evidenc4.95(i4.95(to cshow]TJ13812 0 TD..0002 T

the TYS Defendants' services, or whom the TYS Defendants thought had agreed to do so, were charged as much as $1,493.93 in fees. (*See, e.g.*, Pl.'s Exs. 4-8, 10, 12-15 (Doc. Nos. 6-3, 6-4, 6-

telemarketing scripts, but that he reviewed their scripts, (Smith Admis. ¶ 55), sometimes required corrections, (Smith Dep. 150:1-150:18), and would not write a contract for a merchant account if he was unsatisfied with the scripts, (Smith Dep. 149:19-149:25; 157:11-157:21). Smith threatened to terminate the accounts if Toska and Plancher hired certain people of whom Smith did not approve, (*id.* at 203:3-203:9), and he also recommended that Toska and Plancher hire a specialist to defend TYS against consumers who sought chargebacks (*id.* at 109:25-112:3).[3] Smith admitted that he required Toska and Plancher to purchase Jonathon E. Warren's consulting services "according to [his] instruction." (Smith Admis. ¶ 13.) Smith, personally and through his associates, kept a close eye on Toska and Plancher. He admitted that he personally visited the business premises of TYS "to monitor the[ir] business practices." (Smith Admis. ¶¶ 47-48.) Smith also sent his employee, Leon Williams, to go "walking down two or three times a week, just listening" to the telemarketers at the TYS offices. (Smith Dep. 42:10-42:12.) In addition to exerting considerable leverage over the business, Smith testified that he charged a handsome percentage of TYS's sales—ten to twelve percent, minus what he paid UPS—as his fee for brokering the merchant accounts. (Smith Dep. 55:17-57:25.)

C. UPS, DePuydt, and the TYS Credit Card Processing Agreements

UPS, which also does business as Newtek, is a third-party credit card payments processor that provides the interface between banks and their merchant customers. (*See generally* Pl.'s Ex. 44 (DePuydt Dep. Vol. I) (Doc. No. 174-1) 7:22-8:12.) UPS relies significantly on independent

[3] In addition to Smith's testimony, Toska testified that Smith "required" TYS to hire Eaton. (Pl.'s Ex. 27 (Toska Dep.) 101:21-102:7.) In his Affidavit, Smith stated that he "had no control or role, conceiving, suggesting or hiring a Merchants' Specialist apparently being utilized by the TYS Defendants." (Doc. No. 188 ¶ 6.) Because the Court concludes that Smith's Affidavit is a sham, his assertion that he did not have a role in the TYS Defendants' hiring of Eaton does not establish a contradictory issue of material fact.

sales agents like Smith to generate business—the firm "had approximately 50 to 100 external sales agents," but only "around six" agents who were salaried employees. (*Id.* at 8:17-8:24.) UPS opened two merchant accounts for the TYS Defendants: TYS 1, opened on November 22, 2011; and TYS 2, opened on May 3, 2012. (UPS Answer (Doc. No. 153) ¶ 59; Smith Admis. ¶¶ 28, 34.)

Derek DePuydt served as UPS's president during the time period relevant to the alleged misconduct. (DePuydt Answer (Doc. No. 85) ¶ 17; UPS Answer ¶ 18.) DePuydt had "final review" of merchant account applications brought to the firm by Smith because Smith was an important and profitable source of referrals for UPS. (DePuydt Dep. Vol. I 10:8-10:16, 11:3-11:6; Pl.'s Ex. 47 (DePuydt Dep. Vol. II) (Doc. No. 174-1) 100:14-101:14.) DePuydt reviewed TYS's merchant account application and Plancher's and Toska's personal financial statements, tax returns, and credit reports in the course of approving the merchant application that eventually became TYS 1. (DePuydt Dep. Vol. I 31:15-35:24, 66:13-67:14; DePuydt Dep. Vol. II 97:8-100:6.) DePuydt personally approved TYS 1, (DePuydt Dep. Vol. I 56:7-56:15), even though the materials he reviewed noted "serious delinquencies" on Toska's credit report, $10,000 of past due debt and a credit score of just 494 for Plancher, and notations indicating "high risk fraud alert" for both Toska and Plancher. (DePuydt Dep. Vol. II 98:14-99:20.) DePuydt subsequently approved TYS 2, (DePuydt Dep. Vol. I 69:17-69:22), even though (at 8:17-8i24.) UPS opened)]3l.'s Ex.

(1993)).[4] The Court is under no obligation to rewrite a pleading for a *pro se* party. *Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1320 (11th Cir. 2006) (citation omitted).

III. ANALYSIS

Section Five of the Federal Trade Commission Act ("FTC Act") prohibits "unfair or deceptive acts or practices in or affecting co

"an integrated business," "maze of interrelated companies," or common enterprise. *Del. Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964) (per curiam) (citation omitted). When corporations are found to be in a common enterprise, "each may be held liable for the deceptive acts and practices of the other." *FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1182 (N.D. Ga. 2008) (citations omitted). There is not one universal or mandatory "factor test" to determine whether a

if he directly participated in the deceptive practices or acts or had authority to control them. *FTC v. Gem Merch. Corp.*

The three-page Affidavit (Doc. No. 188) that Smith filed in response to the FTC's Motion does not offer competent evidence to avoid this result. Many of Smith's statements in the affidavit are conclusory denials of the FTC's allegations, which are not probative evidence that would demonstrate the existence of a disputed issue of material fact. *Anderson*, 477 U.S. at 248. The remainder of the Affidavit is a sham, contradicted by Smith's statements in his own deposition. "[A] district court may find an affidavit which contradicts testimony on deposition a sham when

Plancher] Tara's name," (Smith Dep. 109:25-112:3). Although it might literally be true that Smith did not "make any direct suggestions or changes to any script being used by the TYS Defendants' employees," (Smith Aff. ¶ 4), he testified that he would not write a contract for a merchant account if he was unsatisfied with the scripts, (Smith Dep. 149:19-149:25; 157:11-157:21). Finally, Smith's statement to the effect that he only visited the TYS business premises on an infrequent basis, (Smith Aff. ¶ 4), is of no moment when he admitted, at his deposition, to paying two agents to monitor the premises for him, (Smith Dep. 40:24-41:6; 42:10-42:12). Smith does not address, let alone explain, these inconsistencies; thus, the Affidavit is a sham. Even if it were not, no reasonable juror could absolve Smith of liability for the conduct alleged in Counts I through XI based on his conclusory Affidavit—the sole piece of "evidence" he submitted in response to the FTC's Motion. *See Anderson*, 477 U.S. at 252.

B. Count XII: UPS's Alleged Substantial Assistance in Violation of the TSR

It is a deceptive telemarketing act or practice and a violation of the TSR for anyone "to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates" other portions of the TSR. 16 C.F.R. § 310.3(b). Count XII alleges that UPS provided substantial assistance to the TYS Defendants by processing all of their credit card transactions.

The threshold for substantial assistance is not nearly as high as UPS seems to believe. The FTC must identify something more than "'casual or incidental' help to the telemarketer," but does not have to show a "direct connection" between the assistance and the misrepresentation for an entity to be liable under § 310.3(b). *FTC v. Chapman*, 714 F.3d 1211, 1216 (10th Cir. 2013) (citation omitted). Thus, "cleaning a telemarketer's office" is not enough to support substantial assistance liability, *id.*, but "[p]roviding lists of contacts to a seller or telemarketer that identify

persons over the age of 55" could be, *FTC v. Capital Choice Consumer Credit, Inc.*, No. 02-21050

to the general rule when an agent is "secretly . . . acting adversely to the principal and entirely for his own or another's purposes." *LanChile*

DePuydt, but took no further action. (Olszewski Aff. ¶ 19.) According to Olszewski, DePuydt assured her and Schaefer that "upper management knew" about the Smith accounts and that the revenue from them "was too important to the company." (*Id.*) Thus, while DePuydt's conduct was regrettable, and almost certainly in violation of company policy, he was not an adverse agent.

IV. CONCLUSION

Based on the foregoing, it is ordered as follows:

1. Plaintiff Federal Trade Commission's Motion for Summary Judgment (Doc. No. 174), filed June 30, 2014, is **GRANTED**.

2. The FTC's Motion *in limine* (Doc. No. 187), filed July 30, 2014, is **DENIED as moot**.

3. The FTC shall file Motions for Permanent Injunctions, including proposed injunctions, on or before December 5, 2014. If it seeks any other relief besides the injunctions, the FTC shall file a motion for final judgment to that effect on or before December 5, 2014.

DONE and **ORDERED** in Chambers, in Orlando, Florida on November 18, 2014.